

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of

Implementation of Cable Act Reform
Provisions of the Telecommunications
Act of 1996

)
)
)
)
)

CS Docket No. 96-85

RECEIVED

JUN 14 1996

DOCKET FILE COPY ORIGINAL

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

COMMENTS OF THE CALIFORNIA CABLE TELEVISION ASSOCIATION

Jerry Yanowitz
Jeffrey Sinsheimer
CALIFORNIA CABLE TELEVISION
ASSOCIATION
4341 Piedmont Avenue
Oakland, California 94611
(510) 428-2225

Frank W. Lloyd
Anthony E. Varona
MINTZ, LEVIN, COHN, FERRIS,
GLOVSKY & POPEO, P.C.
701 Pennsylvania Avenue, N.W.
Suite 900
Washington, D.C. 20004
(202) 434-7300

June 4, 1996

No. of Copies rec'd _____
List ABCDE _____

HC

TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION AND SUMMARY	1
I. California Cable Operators Face Extensive And Aggressive LEC-Affiliated Video Programming Competitors	2
II. Given The Rapid Entry Of LEC Affiliated Competitors Into The Video Market, The Commission Should Adopt Streamlined Procedures for Effective Competition Certification To Carry Out The Intent of the 1996 Telecommunications Act	7
III. The Commission Should Adopt A Definition Of "Affiliate" For Purposes Of The Test That Recognizes The Specific Rationale For And Nature Of LEC Investment In Video Providers	9
IV. The FCC Should Retain Its Interim Standard For Purposes Of Determining Whether LEC-Affiliated MVPDs Are "Offering" Video Programming Services Under The New Effective Competition Test	12
CONCLUSION	14

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

RECEIVED

JUN - 4 1996

In the Matter of)	
)	
Implementation of Cable Act Reform)	CS Docket No. 96-85
Provisions of the Telecommunications)	
Act of 1996)	

COMMENTS OF THE CALIFORNIA CABLE TELEVISION ASSOCIATION

The California Cable Television Association ("CCTA") submits these Comments in response to the Commission's Notice of Proposed Rulemaking in the above captioned proceeding.^{1/} CCTA is a trade association representing cable television operators with over 400 cable television systems in California, including both small, rural systems and national multiple system operators.

INTRODUCTION AND SUMMARY

CCTA's members currently compete with local exchange carriers ("LECs") in the provision of video services in California. CCTA is therefore critically concerned with the FCC's proposals on implementation of the 1996 Telecommunications Act's^{2/} new "effective competition" standard for LEC-affiliated video services.

^{1/}In the Matter of Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996, Order and Notice of Proposed Rulemaking, CS Docket No. 96-85, rel. April 9, 1996 ("NPRM").

^{2/}Telecommunications Act of 1996, Pub. L. No. 104-104, 101 Stat. 56 (enacted Feb. 8, 1996) ("1996 Act").

Because CCTA's members face extensive competition from LEC-affiliated wireline and nonwireline video programming providers, the FCC should adopt streamlined procedures for effective competition certifications to carry out the deregulatory intent of the 1996 Act. The Commission should also adopt a definition of "affiliate" for purposes of the test that recognizes the aggressive intent of LECs in acquiring video provider investments. Specifically, the FCC should count any active or passive ownership interest of 5% or more in a video provider as well as any other indicia of de facto control that demonstrate a LEC's ability and intent to assist the video provider in mounting a serious competitive challenge to the cable operator in its market. Finally, the Commission should retain its interim standard for purposes of determining whether LEC-affiliated entities are "offering" video programming services under the new effective competition test.

I. California Cable Operators Face Extensive And Aggressive LEC-Affiliated Video Programming Competitors

CCTA's members face extensive competition from LEC-affiliated wireline and wireless providers doing business in California. Pacific Telesis Group ("PacTel"), the parent of California's largest LEC Pacific Bell ("Pacific"), expects to cover seven million homes with 100 channel digital MMDS service by 1997 through its affiliate Pacific Telesis Enterprises ("PTE").^{3/} Since enactment of the 1996 Act, Pacific Bell has applied for a cable franchise in San Jose where it currently serves 1000 customers^{4/} and has constructed a

^{3/}See Pacific Telesis Release, Wireless Digital Television - Frequently Asked Questions, available at www.pactel.com (Jan. 30, 1996).

^{4/}See Ex Parte Letter from Howard J. Symons, outside counsel for Tele-Communications, Inc., to Jackie Chorney, Legal Advisor to Chairman Reed Hundt, Federal Communications Commission (May 17, 1996).

significant amount of hybrid fiber-coaxial ("HFC") facilities throughout the state. The second largest LEC in California, GTE, has been awarded cable franchises in Ventura County, California.^{5/}

PacTel's desire to enter the video programming market as quickly and aggressively as possible was clear from the time Pacific first applied for Section 214 authority to build a video dialtone system in four areas within California.^{6/} One week after receiving Commission authority to construct and operate video dialtone facilities,^{7/} Pacific announced that it had completed its acquisition of Cross Country Wireless, Inc. ("CCW"), an MMDS provider.^{8/}

PacTel revealed that it intends to utilize CCW's MMDS licenses as part of a three- to four-year strategy designed to compete with cable companies to accumulate end-user subscribers for its eventual wireline system.^{9/} By virtue of its ITFS channel leases and MMDS facilities, CCW, in fact, is positioned to be a direct competitor with cable television

^{5/}See "GTE Media Ventures Signs Its First Cable TV Franchise," Telecommunications Reports at 26 (Feb. 12, 1996).

^{6/}Applications of Pacific Bell, File Nos. W-P-C 6913-16 (filed Dec. 20, 1993).

^{7/}In re Applications of Pacific Bell, File Nos. 6913-6916, Order and Authorization, FCC No. 95-302 (rel. August 15, 1995) ("Pacific Bell Order").

^{8/}PacTel's wholly-owned subsidiary PTE owns 100% of the stock of Cross Country Telecommunications Inc. ("CCT"), and 89.17% of the stock of CCW; CCT owns the remaining 10.83% of the CCW stock.

^{9/}"Interview with Lee Camp," Inside Line News Bulletin at 3 (Sept. 27, 1995) ("Camp Interview").

operators for 3.5 million households in Los Angeles.^{10/} Following its CCW acquisition, PacTel boasted that it and its affiliates intended to compete "head-to-head almost immediately with cable TV companies in Southern California by offering service to five million homes."^{11/}

CCW offers wireless cable service to subscribers in Southern California through its MMDS, MDS and ITFS licenses in Riverside, California and in other communities throughout the region.^{12/} PTE recently won auctions to serve all of the major metropolitan areas in California and has entered into additional agreements to purchase California MMDS

^{10/}See Katz, Richard, "Cross Country: We Have LA Wireless Market," Multichannel News at 6 (June 27, 1994). CCW announced that it controlled the wireless market in Los Angeles through channel-lease agreements for 30 channels of capacity. *Id.* It further stated that it has channel-lease agreements with the University of Southern California, California State University, INTELCOM, a consortium of 42 Southern California colleges, and the Pasadena Unified School District.

^{11/}See Camp Interview at 1.

^{12/}See "Pacific Telesis Telco to Offer Wireless Cable Television," Press Release (July 25, 1995). In its press release announcing completion of the acquisition of Cross Country, Michael Fitzpatrick, the president and CEO of Pacific Telesis Enterprise Group stated that: "[t]he acquisition means that right this minute, we have over 40,000 video customers in Riverside, California.").

operators.^{13/} It also recently received FCC approval to consummate the purchase of an MMDS station in La Habra, California (WBB785).^{14/}

PacTel also announced in mid-1995 that its \$300 million joint media and technology venture with Bell Atlantic and NYNEX, TELE-TV "is moving aggressively to secure programming for [PacTel's] wireless digital offering[and] over time, TELE-TV will also be a major source of programming for the wireline network, particularly for digital services."^{15/} CCW has already obtained exclusive rights to air certain Los Angeles Dodgers baseball games.^{16/} TELE-TV recently announced that it would acquire 3 million

^{13/}PTE was the winning bidder in the Commission's MDS auction and has filed long-form applications for service in Los Angeles (BTA No. B262), San Diego (BTA No. 402), and San Francisco/Oakland/San Jose (BTA No. 404), California. PacTel has also entered into an agreement to acquire the outstanding shares of Videotron (Bay Area) Inc. and Wireless Holdings Inc., under which PacTel-designated entities will have the power to acquire FCC licenses. See "EMR Analysis: SNC/PacTel Acquisition Will Have Many Strengths, One Glaring Drawback," Electronic Marketplace Report, April 16, 1996. In addition, PacTel recently entered into an agreement to merge with SBC Communications Inc. ("SBC"), which is also an MMDS licensee. See "Wave of Phone Mergers May Do Little For Competition," Los Angeles Times, D1, April 23, 1996.

^{14/}See FCC File No. 50385-CM-AL-96. PacTel's PTE subsidiary has itself acquired Commission consent to consummate the assignment of MMDS licenses WNTL542 and WPW94 (FCC File No. 51052-CM-TC(2)-95), as well as a host of earth station and point to point microwave and Cable Relay Service licenses from CC Wireless Inc., all for use in Riverside, California.

^{15/}See Pacific Telesis Group Section 214 Application at 21, n.26; see also PacTel Opposition to Petitions to Deny, File Nos. W-P-C 6913-6916, at 12 (filed February 28, 1994).

^{16/}"A Unified SBC-Pactel Could Mean Changes for Telcos' Video Ventures," Interactive TV Strategies, April 15, 1996.

digital boxes from Thompson Inc. and that these boxes would increase capacity on the MMDS systems to permit subscribers to receive 120 channels.^{17/}

PacTel and GTE are not the only LECs entering the video services market in California. CA Wireless Systems, Inc. ("CS") d/b/a Popvision, which is affiliated with Bell Atlantic and NYNEX -- PacTel's TELE-TV partners -- both directly and through its parent company, CAI Wireless Systems, Inc. ("CAI")^{18/} operates wireless cable systems in several California communities. CAI's wholly-owned subsidiary, Atlantic Microsystems, Inc. ("AMI") is the winning bidder of the FCC's MMDS/MDS auction for BTA No. B028, Bakersfield, CA, and has filed an application with the Commission to assign its MDS BTA authorization to CAI.^{19/} AMI also is the winning bidder for the Modesto, California BTA, as well as for the Stockton BTA and anticipates assigning these licenses to CS as soon as the Commission consents to such assignment.^{20/}

Thus, within a matter of months cable television operators in California could face competition from LEC-affiliated owned MMDS systems offering digital multichannel video packages to most of the state's residences.

^{17/}"Telcos Buy Digital Boxes For 120-Channel Wireless Systems," Financial Times Limited, New Media Markets, Sept. 28, 1995.

^{18/}See In re Petition of Time Warner Cable For Determination of Effective Competition, Petition for Special Relief, filed May 2, 1996, p. 2-3.

^{19/}See Atlantic Microsystems, Inc., Application for MDS/MMDS Basic Trading Area Authorization Statement of Intent, BTA No. B028, Bakersfield, CA, (filed May 10, 1996). CAI either owns, leases or is seeking to lease all of the MDS, MMDS and ITFS capacity licensed to incumbents in the Bakersfield BTA, which is operated under the name Valley Wireless and currently serves over 10,000 customers with 33 channels of programming. Id.

^{20/}See Atlantic Microsystems, Inc., Application for MDS/MMDS Basic Trading Area Authorization Statement of Intent, BTA No. B303, Modesto, CA, (filed May 10, 1996).

II. Given The Rapid Entry Of LEC Affiliated Competitors Into The Video Market, The Commission Should Adopt Streamlined Procedures for Effective Competition Certification To Carry Out The Intent of the 1996 Telecommunications Act

Facing such vigorous LEC competitors that are not subject to rate regulation, California cable operators should not have to encounter delays before being able to respond by restructuring their programming packages to meet this competition. While cable operators are highly unlikely to raise rates in response to a telco video competitor, they may wish to adopt new tiering and marketing strategies that are more consumer-friendly than those dictated by the FCC's current rate regulation regime.

Under the rate regulation provisions of the 1992 Cable Act,^{21/} the Commission has adopted regulations that result in cable operators' tiers almost being set in concrete absent effective competition.^{22/} In the 1996 Act, Congress recognized that, when faced with competition from LEC affiliates, such regulations were artificial barriers to competition from which cable television operators should be freed.^{23/} The Commission should adopt procedural guidelines for the resolution of effective competition certifications to ensure that cable operators facing effective competition are deregulated soon after submitting such a showing.

The Commission should require that certifications of effective competition must be resolved, by the Commission itself or on delegated authority by the Cable Services Bureau,

^{21/}See 47 U.S.C. § 623, et seq.

^{22/}47 C.F.R. § 76.922 et seq.

^{23/}47 U.S.C. § 543(a)(2); see also NPRM at ¶ 17 ("A cable system that meets all of the relevant criteria in the new effective competition test is exempt from rate regulation as of February 8, 1996, the date the 1996 Act was enacted.") See also 141 Cong. Rec. 58243 (daily ed. June 13, 1995 (statement of Sen. Pressler)).

within a specific time period from their submission. A mandatory limit on the Commission's review period is reasonable and consistent with other limitations concerning multichannel video issues. For example, as part of the 1996 Act, Congress enacted 90-day review limitation on rate complaints.^{24/} In fact, Congress believed that 10 days was sufficient for the FCC to certify a LEC-affiliated open video system ("OVS").^{25/} It would be inequitable to delay for a significantly longer time a cable operator's ability to respond to an OVS or other LEC video competitor. Cable television operators are entitled to a short, definite process.

Alternatively, or in combination with the above procedure, the Commission should consider adopting an "automatic approval" certification mechanism for purposes of the new effective competition test, similar to the one implemented by the Commission in its 1993 Report and Order with respect to local franchising authority ("LFA") review of cable operator rate justifications.^{26/} To justify rates under the Commission's benchmark ratesetting mechanism, a cable operator submits the appropriate completed justification form with the LFA. If the LFA does not act upon the rate justification with 30 days of its

^{24/}1996 Act, § 301(b)(1)(C), 47 U.S.C. § 543(c)(3). If the Commission were resolve rate complaints in 90 days, but place no time limit on the review of an effective competition certification, this would create an incongruous situation. Operators facing competition and seeking deregulation likely would receive the imprimatur of the Commission as to the legitimacy of their deregulated status sooner by restructuring rates, causing a rate complaint to be filed with the Commission, and raising the effective competition standard as a defense than by forbearing and proceeding through an effective competition certification.

^{25/}Communications Act 47 U.S.C. § 653(a)(1), § 573(a)(1).

^{26/}In the Matter of Implementation of Sections of the Cable Television Consumer protection and Competition Act of 1992; Rate Regulation; Report and Order and Further Notice of Proposed Rulemaking; 8 FCC Rcd 5631, 5709-10 (¶¶ 118-120) 1993.

submission, the rates are presumed reasonable and are deemed approved.^{27/} An automatic approval mechanism for processing effective competition certifications might provide that a cable operator's effective competition certification is deemed approved by the FCC no later than 30 days following its filing.

III. The Commission Should Adopt A Definition Of "Affiliate" For Purposes Of The Test That Recognizes The Specific Rationale For And Nature Of LEC Investment In Video Providers

As the FCC notes,^{28/} the 1996 Act does not alter the existing definition of "affiliate" under Title VI -- the cable television section -- of the Communications Act. Instead it adopts a new general definition of "affiliate" under Title I of the Act.^{29/} The Commission invites comment on whether it should adopt the new Title I definition of a LEC video "affiliate" for purposes of the new effective competition test.

CCTA urges the Commission to adopt a relatively low ownership interest affiliation threshold for purposes of the LEC video affiliate effective competition test because of the record before it of the objectives of PacTel, GTE, and other LECs as they have announced their entry into the multichannel market arena. The LECs are entering the video services business not only as an offensive strategy to expand their service offerings and increase their revenues and customer pools, but also as a defensive strategy in competing with cable operators, which present the LECs with the most serious potential facilities-based competition

^{27/}Id. at ¶ 118.

^{28/}NPRM at ¶¶ 15-16, 74-77.

^{29/}See 1996 Act at § 3(a)(2); codified at 47 U.S.C. § 153(1).

in the telephony market, in order to deny cable operators the capital to expand into this field.^{30/} Moreover, even prior to the recent merger announcements, the LECs had begun to pool their video resources. As noted above, the multi-million dollar TELE-TV alliance of PacTel, Bell Atlantic and NYNEX has already consummated programming and MMDS equipment deals. Two of those partners, Bell Atlantic and NYNEX, have announced merger plans.^{31/} The second LEC video programming consortium, known as Americast, includes Ameritech, BellSouth, Southwestern Bell ("SBC") and Disney.^{32/} Since the PacTel/SBC merger was announced, there has been speculation that TELE-TV and Americast might merge. Based on this activity, the LECs fairly can be assumed never to be investing in a video provider in a passive manner.

Thus, in light of the LECs' proclaimed interests in competing aggressively in the video marketplace,^{33/} the Commission must select an affiliation standard in effective competition determinations that will adequately account for LECs' true intent in acquiring

^{30/}While cable companies were provided with certain statutory protections in entering the telephony market, Congress acknowledged that this playing field between LECs and cable is tilted in favor of the LECs. On that basis, Congress directed the Commission to promulgate rules that will prevent the LECs from exploiting their monopoly power against cable and other new telephony competitors. See 141 Cong. Rec. S 7984 (daily ed., June 7, 1995); see also In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Local Competition Notice, FCC 96-182 (rel. April 19, 1996)(recognizing the need for the Commission to establish rules governing the entry of competitors into the local telephony marketplace).

^{31/}See "Telecom's Fast Start," Dallas Morning News, 1H, May 19, 1996.

^{32/}See "BellSouth Steps Up Vid Test, Daily Variety, 8, June 3, 1996.

^{33/}See, e.g., "PacTel Takes Aim at Cable," Multichannel News, March 18, 1996, at 1; "PacTel Readies Fall Attack on L.A.-Area Cable Systems," CableWorld, February 26, 1996, at 1; "PacTel Confirms \$165M Wireless Cable Purchase," Multichannel News, December 4, 1995, at 12.

video provider investments. The Title I definition of "affiliate," by its own terms, is a general definition that is applicable "unless the context otherwise requires."^{34/} The context of LEC entry into the video marketplace merits a specially-tailored definition of "affiliate" that includes any entity that LECs are in fact directing in their confrontation with cable operators.

The proper test would count any active or passive LEC ownership interest of 5 % or more in an MVPD provider as well as other indicia of de facto control that demonstrate a LEC's ability and intent to assist the MVPD in mounting a serious challenge to the cable operator in the market. Congress intended for the cable operator, at this point, to be able to take steps to restructure its rates to meet this challenge.

CS Wireless Systems, Inc. ("CS") d/b/a Popvision, which is affiliated with Bell Atlantic and NYNEX both directly and through its parent company, CAI Wireless Systems, Inc. ("CAI")^{35/} is one example of the strategic LEC interests in MVPD affiliates. As noted above, CS presents Time Warner Cable with effective competition in Bakersfield, California and is planning to enter other California markets. Bell Atlantic and NYNEX's holdings of the Common Stock of CS, plus their substantial non-voting and contingent investments in CAI,^{36/} make a strong case for a finding of effective competition by a LEC video affiliate in any market where CS is active.

^{34/}Section 3 of the Communications Act, 47 U.S.C. § 153.

^{35/}See In re Petition of Time Warner Cable For Determination of Effective Competition, Petition for Special Relief, filed May 2, 1996, p. 2-3.

^{36/}E.g., 14 % convertible Term Notes, 7,000 shares of Senior Preferred Stock, warrants to purchase Common Stock and Voting Preferred Stock.

To insure, however, that the effective competition test's affiliation standard clearly encompasses similar scenarios where there are strong indicia of control beyond voting equity ownership percentages, the Commission should clarify that a LEC will be deemed affiliated with an MVPD, notwithstanding any voting or non-voting equity ownership interest threshold it adopts, if the LEC can otherwise be shown to be in de facto control of the affiliate.^{37/}

Absent such clarification, a LEC with de facto control over an affiliate by virtue of a management or marketing agreement or other similar arrangement would be able to subvert the objectives of the 1996 Act by prolonging restraints on a competitive response by the cable operators it faces.

IV. The FCC Should Retain Its Interim Standard For Purposes Of Determining Whether LEC-Affiliated MVPDs Are "Offering" Video Programming Services Under The New Effective Competition Test

Given the clarity of the Congress' instruction regarding the interpretation of the term "offer" in the new effective competition test,^{38/} the Commission's request for comments concerning whether it should modify the existing definition to include a numerical pass rate

^{37/}In making such a determination, the FCC should look to such de facto control criteria as these it established in Intermountain Microwave, 24 Rad.Reg. (P&F) 983, 984 (1963).

^{38/}Congress made clear in the Conference Report to the 1996 Act that for purposes of the new effective competition test, the term "offer" has the same meaning given the term in the Commission's rules as in effect on the date of enactment of the bill. 1996 Telecom Act, S. Rep. 104-230 at 170 (Feb. 1, 1996). Under the existing FCC definition of "offer," an MVPD service would be deemed offered when the provider "is physically able to deliver service to potential subscribers," and "when no regulatory, technical or other impediments to households taking service exist, and potential subscribers in the franchise area are reasonably aware that they may purchase the services of the [MVPD]." 47 C.F.R. § 76.905(e).

requirement for use in applying the new fourth prong of the effective competition test^{39/} is at odds with the intent of Congress in the 1996 Act.^{40/}

The fact that Congress did not implement a numerical pass or penetration rate requirement in the telco video affiliate prong of the effective competition test comports with the special nature of LEC entry into video programming. Congress assessed correctly that LECs would compete aggressively and with weighty competitive arsenals whenever they entered a franchise area.

For determining the "offering" of service by an MMDS operator, the Commission was correct in establishing the 35-mile noninterference zone as the presumptive service area for purposes of effective competition certifications.^{41/} The Commission should clarify, however, that a cable operator may demonstrate that an MMDS system provides effective competition beyond its presumptive signal delivery zone. The Commission could require that, for purposes of such a showing, cable operators submit to the Commission information concerning the geographic scope of the MMDS operator's marketing efforts, technical signal strength information, or other data establishing that the MMDS operator can and does offer service to homes outside of the 35-mile zone.

^{39/}See NPRM at ¶ 72.

^{40/}See NPRM, Separate Statement of Rachelle B. Chong at 2. See also Separate Statement of Commissioner James H. Quello at 1.

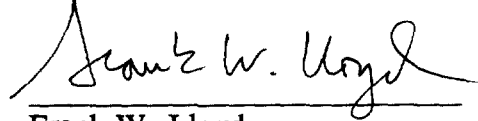
^{41/}NPRM at ¶ 10.

CONCLUSION

Given the aggressive nature of LEC competition in the video service marketplace in California as well as other markets, the Commission should adopt the above proposals for streamlined procedures and policies for effective competition certifications that implement the deregulatory thrust of the 1996 Act.

Respectfully submitted,

CALIFORNIA CABLE TELEVISION
ASSOCIATION



Frank W. Lloyd
Anthony E. Varona
MINTZ, LEVIN, COHN, FERRIS,
GLOVSKY & POPEO, P.C.
701 Pennsylvania Avenue, N.W.
Suite 900
Washington, D.C. 20004
(202) 434-7300

Jerry Yanowitz
Jeffrey Sinsheimer
CALIFORNIA CABLE TELEVISION
ASSOCIATION
4341 Piedmont Avenue
Oakland, California 94611
(510) 428-2225

June 4, 1996

F1/53516.1